

**ORIGINAL**

STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

ALAN STARR TROWBRIDGE,

Defendant-Appellant.

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Supreme Court  
No. 146357

Court of Appeals  
No.: 300460

Grand Traverse Circuit  
Court No.: 2010-011026-FC

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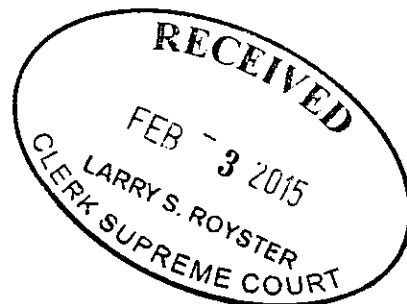
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**DEFENDANT-APPELLANT'S  
SUPPLEMENTAL BRIEF**

\*\*\*PROOF OF SERVICE\*\*\*

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## **STATEMENT OF JURISDICTION**

Defendant-Appellant stands on the jurisdictional statement set forth in his application and adds that this Court allowed for the filing of a supplemental brief in its Order dated December 23, 2014, a copy of which is attached.

## **QUESTION PRESENTED**

### **THE ISSUE**

I. DEFENSE COUNSEL ERRONEOUSLY TOLD DEFENDANT THAT THE SENTENCING GUIDELINES APPLIED TO HIS CASE WHEN THE CHARGE CARRIED A MANDATORY PENALTY OF NON-PAROLABLE LIFE. SAID ERROR RESULTED IN NO PLEA OFFER BEING TIMELY ACCEPTED AND DENIED DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS RECOGNIZED IN THE *LAFLER* DECISION.

The Circuit Court answered: No.

Defendant-Appellant answers: Yes.

Plaintiff-Appellee answered: No.

The Court of Appeals answered: No.

## STATEMENT OF FACTS

The essential facts are not disputed. Trial counsel did not tell defendant that the offense statute carried a mandatory term of any kind when it carried a mandatory term of life without parole.<sup>1</sup> Nonetheless, defendant tried to accept a plea offer. The circuit court foreclosed that from occurring because a plea deadline had passed.<sup>2</sup> Trowbridge was convicted and, on the day of sentencing, learned about the mandatory penalty.<sup>3</sup> About one month before this case was argued before the Court of Appeals, the United States Supreme Court issued its decision in *Lafler*.<sup>4</sup>

The Court of Appeals affirmed, finding that the second prong of *Strickland*, prejudice, was not met. Defendant has sought leave to appeal before this Court. On December 23, 2014, this Court directed that oral argument be scheduled, that additional briefing could be filed and, “At oral argument, the parties shall address whether the Court of Appeals correctly resolved the defendant’s ineffective assistance claim in light of *People v Douglas*.”

In light of *Douglas*, the Court of Appeals erred in the case *sub judice*: (1) Unlike *Douglas*, Trowbridge attempted to accept a prosecution plea offer before trial began, (2) Unlike *Douglas*, Trowbridge’s acceptance of the offer was not conditional or ambiguous, and (3) Unlike *Douglas*, trial counsel testified, against his own interests, that Trowbridge would have accepted a plea offer if he had been properly advised. All three differences alter the prejudice analysis required under *Strickland*.

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<sup>1</sup> See July 21, 2011 evidentiary hearing (“Ev. Hrg.”) at 25-26

<sup>2</sup> TT IV at 160-162

<sup>3</sup> T. 9/10/10 at 30

<sup>4</sup> *Lafler v Cooper*, 566 US \_\_\_\_; 132 SCt 1376; 79 USLW 3102 (2012)

# ARGUMENT

## THE ISSUE

I. DEFENSE COUNSEL ERRONEOUSLY TOLD DEFENDANT THAT THE SENTENCING GUIDELINES APPLIED TO HIS CASE WHEN THE CHARGE CARRIED A MANDATORY PENALTY OF NON-PAROLABLE LIFE. SAID ERROR RESULTED IN NO PLEA OFFER BEING TIMELY ACCEPTED AND DENIED DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS RECOGNIZED IN THE *LAFLER* DECISION.

### I. Introduction

If the defendant satisfies the first prong of *Strickland* by establishing constitutionally defective performance during plea negotiations (“*Lafler* issues”), the showing of prejudice required under the second prong of *Strickland* is comparatively low. In such cases, the prejudice prong is satisfied if there exists a “reasonable probability” that defendant would have accepted a plea offer but-for counsel’s inadequate advice.<sup>5</sup> The prejudice prong is presumptively satisfied if the difference between the length of the sentence proposed in the plea offer and the sentence imposed after a trial conviction is substantial.<sup>6</sup>

In *Douglas*, this Court unanimously held that the defendant was entitled to a new trial due to trial error, but divided on whether pre-trial error entitled that defendant to reinstatement of a plea offer under *Lafler*. The *Douglas* decision may not be a ‘road map’ for all cases that raise *Lafler* issues; other cases will have different types of facts. The *Douglas* decision does, however, focus on several important potential considerations in any *Lafler* claim and, as to all of them, the case *sub judice* is unlike *Douglas*.

### II. Unlike *Douglas*, Trowbridge Tried to Accept A Prosecution Plea Offer Before Trial Began

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<sup>5</sup> *Lafler*, 132 S. Ct. at 1385; see also *Hodges v. Colson*, 727 F.3d 517, 550 (6th Cir. 2013) (en banc) (citing *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003), for the proposition that it is easier to show prejudice in the guilty plea context than in other contexts because the claimant need only show a reasonable probability that he would have pleaded differently)

<sup>6</sup> See *United States v. Morris*, 470 F.3d 596, 602-03 (6th Cir. 2006), *Griffin*, 330 F.3d at 737.

Trial counsel misled Trowbridge into believing that, if he lost at trial, he faced a sentencing guidelines range of 171 to 356 months.<sup>7</sup> Unaware that his offense was punishable by non-parolable life, Trowbridge nonetheless tried to accept a plea offer.<sup>8</sup> That did not occur because it came after a plea deadline set by the circuit court.<sup>9</sup> As argued in our application, it is reasonably probable that if Trowbridge had been properly advised, he would have made a *timely* acceptance of the offer. This feature of the record – Trowbridge attempting to plead out – contrasts with *Douglas* where no such attempt was made.

### **III. Unlike *Douglas*, Trowbridge's Willingness to Accept the Prosecution's Offer Was Not Conditional or Ambiguous**

In *Douglas*, the defendant testified that he would have accepted a plea offer if he had been properly advised by his counsel. But the majority opinion found:

[Defendant] also testified, however, that he would not have accepted any plea that required sex-offender registration because he was innocent and because it would affect his relationship with his children. The defendant further testified that he probably would not have accepted a plea that required any jail time and that, in deciding to reject the prosecution's plea offer, the minimum sentence he faced at trial did not matter because he was innocent, he did not commit the crime, and he did not think he would lose.<sup>10</sup>

The majority opinion found that this testimony was, "...confusing at best, and casts significant doubt upon what circumstances, if any, would have led the defendant to accept a plea."<sup>11</sup> In the case *sub judice*, however, trial counsel, against his own interests, testified that he and Trowbridge "were very interested in resolving this with a plea."<sup>12</sup> He testified that Trowbridge "is not a fighter," "has a passive personality," and "basically was relying upon my advice and judgment."<sup>13</sup>

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<sup>7</sup> Ev. Hrg. 77. As noted in FN 19 of our application, this would have conveyed to Trowbridge that, in a worst case scenario, he still would be eligible for parole before reaching age 60.

<sup>8</sup> TT IV at 160-161.

<sup>9</sup> TT I 160-162

<sup>10</sup> *People v Douglas*, 496 Mich 557, 597; 852 NW2d 587 (2014)

<sup>11</sup> *Id.*

<sup>12</sup> Ev. Hrg. 31, 48, 66

<sup>13</sup> Ev. Hrg. 36

He testified that Trowbridge would have accepted the July 30th offer if he had been properly advised<sup>14</sup> and did accept the August 9th offer even before he knew he was facing a sentence of non-parolable life.<sup>15</sup>

#### **IV. Unlike *Douglas*, Counsel Testified That the Offer Would Have Been Accepted Upon Proper Advice**

In *Douglas*, this Court found that the Court of Appeals erred in finding that trial counsel would have “pressed” Douglas to plead-out if he had been aware of the mandatory penalty applicable in that case.<sup>16</sup> The Court found that counsel only testified that he, “would have made sure [defendant] understood how long 25 years was” and would have pressed for a plea only because, in hindsight, he knew they lost at trial.<sup>17</sup> And trial counsel testified that Douglas “had always maintained his innocence, a claim that defense counsel believed.”<sup>18</sup>

The majority found:

[Trial counsel] further testified that his and the defendant’s position had always been that the defendant would plead to nothing that would result in placing the defendant on the sex-offender registry, in part because the defendant was concerned about losing contact with his children, but also because he found the type of behavior to which he would be pleading “disgusting and offensive” and would never engage in it.<sup>19</sup>

It is implausible to argue that anything like the above appears in the case *sub judice*. In *Douglas*, trial counsel testified that defendant told him he would never do the acts he was accused of because he found them “disgusting and offensive.”<sup>20</sup> In the case *sub judice*, however, Trowbridge told the jury that he was a risk to children<sup>21</sup> and that he relates to child pornography the way an alcoholic

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<sup>14</sup> Ev. Hrg. 51 lines 12-13, 37

<sup>15</sup> Ev. Hrg. 40 at line 24

<sup>16</sup> *People v Douglas*, 496 Mich at 596-597

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> TT IV 68

relates to a bar.<sup>22</sup> In *Douglas*, counsel testified that defendant maintained he was innocent and that counsel believed him. In the case *sub judice*, Trowbridge tried to accept an offer and trial counsel never said that he believed Trowbridge was innocent.

#### **V. The Court of Appeals' Opinion**

The Court of Appeals, somewhat unfairly, impugned trial counsel's veracity and called his testimony "after-the-fact speculation." That testimony, however, was supported by the fact that Trowbridge *did* attempt to accept a plea offer even while he was ignorant of the full risk he faced at a trial. Trial counsel's testimony was made under oath and against his interests. His testimony had to have been embarrassing and potentially harmful to his reputation.

In *Douglas*, the *ambiguous* testimony of trial counsel, which favored his own interests in that it served as a *denial* of ineffective-assistance, was a critical consideration of this Court's majority in denying that defendant relief. Therefore, it would seem reasonable to suggest that the *unambiguous* testimony of Trowbridge's trial counsel, made *against* his own interests, under oath, and constituting full admissions of ineffective assistance, should be given at least as much weight in favor of granting relief.

#### **VI. The Prosecution's Brief**

If any of us were to hire a contractor to build an office tower and found that an early phase of construction – the pouring of a concrete foundation – was defective and crumbling days after it was poured, people would consider us fools if we told them that, despite knowing about that problem, we believed later stages of construction would be done correctly *by the same contractor*. Yet here, the prosecution, after conceding that trial counsel's performance during plea negotiations was defective, nonetheless premise their argument on decisions Trowbridge later made based upon advice *from the same attorney*.

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<sup>22</sup> TT IV 30-31

In that regard, it is true that Trowbridge testified at trial and denied guilt. But who prepared him for trial and advised him on how to testify? Who ultimately decided to call him at trial? It was the same attorney who recklessly marched into trial without reading the offense statute. It is apparently true that Trowbridge denied guilt to the author of the PSIR. But who advised him on what to say? The same attorney that misadvised him during plea negotiations.

It is not irrelevant that trial counsel had a special trust relationship with Trowbridge. Counsel testified that he had known Trowbridge and Trowbridge's family for years, having represented Trowbridge in his prior felony case, and that he was consulting with Trowbridge's family in the present case.<sup>23</sup>

### ***The No Contest Plea***

The prosecution, in their October 2014 brief, argues that Trowbridge tried to plead no contest, that the circuit court would not have accepted a no contest plea, only a guilty plea, and therefore a plea resolution was never going to occur. Those assertions are not supported by the record. Trial counsel testified that Trowbridge, "Never told me he would never plead guilty."<sup>24</sup> When asked whether, "...the only thing that Mr. Trowbridge agreed to plead to was no contest" trial counsel answered that he never gave defendant that option saying:

So I don't know what he would have done with the CSC 3<sup>rd</sup> guilty plea, because it was not offered. That wasn't the way the offer was presented to him.<sup>25</sup>

Moreover, the circuit court did not have a blanket prohibition against no contest pleas. Rather, the court said, "no contest pleas are *almost* never accepted," but then described a scenario in which they can be – intoxication.<sup>26</sup> No one can know whether a no contest plea would have been accepted in this matter if it had been offered before the plea deadline.

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<sup>23</sup> Ev. Hrg. 27, 37, 42, 61

<sup>24</sup> Ev. Hrg. 69 line 20

<sup>25</sup> Ev. Hrg. 70-71

<sup>26</sup> T. 7/27/2011 9, line 4-5.

### *The 'Claims of Innocence'*

The prosecution writes, “Finally, [trial counsel] admitted that throughout *the entire pretrial process* as well as through the trial and sentencing, Defendant maintained his innocence.”<sup>27</sup> That is not accurate. Trial counsel testified that Trowbridge never said he would never plead guilty (see above), and the testimony the prosecution cites says nothing about pre-trial events, it refers only to the trial and sentencing.<sup>28</sup>

In addition, Trowbridge’s trial testimony does not indicate that he was adamant about denying guilt like the defendant in *Douglas*. Rather, it would seem to indicate that he could have been reasoned with to accept a plea offer, was already mentally prepared to accept a plea offer, if he had been properly advised by trial counsel. He told the jury that he was a risk to children<sup>29</sup> and described for them what “triggers” his criminal behavior.<sup>30</sup> That testimony contrasts sharply with that of the defendant in *Douglas* who told his trial counsel that he found the same type of behavior, “disgusting and offensive and [he] would never engage in it.”<sup>31</sup>

### **VII. Conclusion**

The prosecution argues that the record in this case is “strikingly similar” to that found in *Douglas*. In reality, the two cases are striking dissimilar. And while the Court of Appeals correctly found that the first prong of *Strickland* was met, the Court erred in failing to find that the second prong of *Strickland*, prejudice, was met.

The issue at hand turns on whether trial counsel’s ineffective assistance “affected the outcome

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<sup>27</sup> Prosecution’s October 29, 2014 Brief at 2 citing Ev. Hrg. 68 (emphasis added)

<sup>28</sup> The testimony cited by the prosecution being: “[The Prosecution] Well, in the end it was his decision to go to trial, correct? A. It was. Q. And he maintained throughout trial and throughout the sentencing portion of the case, that he was innocent? A. The record speaks to that, yes” (Ev. Hrg. 68).

<sup>29</sup> TT IV 68

<sup>30</sup> TT IV 29

<sup>31</sup> *People v Douglas*, 496 Mich slip at 596-597

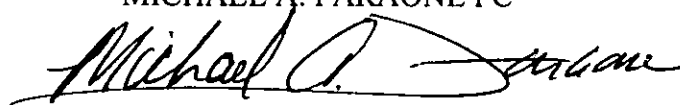
the plea process.”<sup>32</sup> In *Lafler*, the Court set forth four considerations.<sup>33</sup> One, there is a reasonable probability that, if given proper advice, the defendant would have accepted the prosecution’s offer. Two, nothing indicates that the prosecution would have withdrawn their offer in the light of any intervening circumstance. They were trying to resolve the case through a plea on the first day of trial. Three, nothing indicates that the court would have rejected the agreement’s terms if it had been offered before the circuit court’s plea deadline. Four, the sentencing would have been less severe than the sentence that was imposed.

### SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellant thanks this Court for its time and requests that this Honorable Court grant leave to appeal or, in the alternative, that the Court enter an Order reversing the Court of Appeals and remanding the case to the circuit court to place defendant back to where he was before the ineffective assistance occurred. If defendant enters a guilty plea on the record he would be resentenced. If he does not, then the existing Judgment of Sentence would remain in effect.

Respectfully submitted,

MICHAEL A. FARAONE PC

A handwritten signature in black ink, appearing to read "Michael A. Faraone", written over a horizontal line.

Michael A. Faraone (P45332)  
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Lansing, Michigan 48910  
Telephone: (517) 484-5515

Dated: January 29, 2015

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<sup>32</sup> *Hill v. Lockhart*, 474 U.S. 52, 59; 106 S. Ct. 366; 88 Led2d 203 (1985), accord *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012), *Missouri v. Frye*, 566 U.S. \_\_; 132 S. Ct. 1399, 1409-10; 182 Led2d 379 (2012), *Fitzpatrick v. Robinson*, 723 F.3d 624, 634 (6th Cir. 2013), *Cauthern v. Colson*, 736 F.3d 465, 483 (6th Cir. 2013)

<sup>33</sup> *Lafler*, 132 S.Ct. at 1385

# Order

Michigan Supreme Court  
Lansing, Michigan

December 23, 2014

Robert P. Young, Jr.,  
Chief Justice

146357 & (66)(71)

Michael F. Cavanagh  
Stephen J. Markman  
Mary Beth Kelly  
Brian K. Zahra  
Bridget M. McCormack  
David F. Viviano,  
Justices

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

SC: 146357  
COA: 300460  
Grand Traverse CC:  
10-011026-FC

ALAN STARR TROWBRIDGE,  
Defendant-Appellant.

On order of the Court, the motion to expand the record is GRANTED. By order of October 3, 2014, the prosecuting attorney was directed to answer the application for leave to appeal the September 25, 2012 judgment of the Court of Appeals. The answer having been received, the application for leave to appeal is again considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). At oral argument, the parties shall address whether the Court of Appeals correctly resolved the defendant's ineffective assistance of counsel claim in light of *People v Douglas*, 496 Mich 557 (2014). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.



s1217

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 23, 2014

Clerk

STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

ALAN STARR TROWBRIDGE,

Defendant-Appellant.

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Supreme Court  
No. 146357

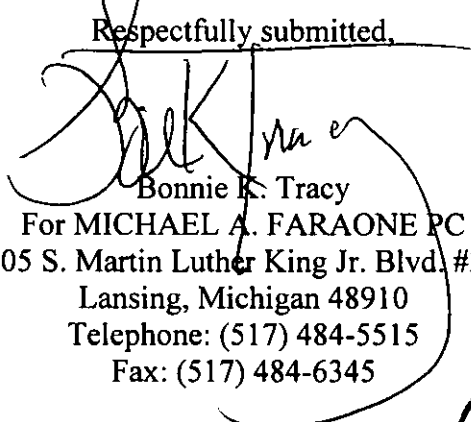
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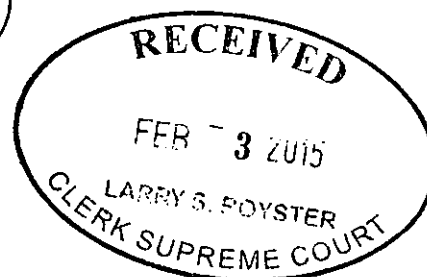
**PROOF OF SERVICE**

Bonnie K. Tracy, for the Law Office of Michael A. Faraone P.C., attorney for the Defendant, hereby states and affirms that on January 29, 2015, she served opposing counsel with the attached **Supplemental Brief** by depositing same into a U.S. mail box, first-class postage attached, and addressed to: Atten. Appellate Division, Grand Traverse County Prosecutor, Grand Traverse County Building, 324 Court Street, Traverse City Michigan 49684.

Respectfully submitted,

  
Bonnie K. Tracy  
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Dated: January 29, 2015



January 29, 2015

Clerk of the Court  
Michigan Supreme Court  
925 W Ottawa St  
Lansing, MI 48915-1741

RE: People v Alan Starr Trowbridge  
Michigan Supreme Court No.: **146357**  
Court of Appeals No.: 300460  
Grand Traverse County Circuit Court No: 2010-011026-FC

Dear Clerk:

Please find for filing an original and seven copies of Defendant-Appellant's Supplemental Brief and Proof of Service. Thank you and with kindest regards, I remain

Very truly yours,

  
**MICHAEL A FARAONE, P.C.**

Michael A Faraone  
Attorney and Counselor at Law

MAF/bkt  
c/file, Client, Prosecution  
enc

